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No. 91-882

In The

Supreme Court of the United States

October Term, 1991

LAWRENCE E. LEWY, *et al.*,

Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARY SUE TERRY
Attorney General of the Commonwealth of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

GAIL STARLING MARSHALL*
Deputy Attorney General

GREGORY E. LUCYK
Senior Assistant Attorney General

BARBARA H. VANN
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

Of Counsel:

PETER W. LOW, Esquire
Professor of Law
University of Virginia
School of Law
Charlottesville,
Virginia 22901

* *Counsel of Record for Respondent*

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Supreme Court of Virginia decided a federal question when it determined that *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), should not be applied retroactively. As an alternative holding, the Virginia Supreme Court decided as a matter of state law that the state tax refund remedy sought by these Petitioners was unavailable. Petitioners do not argue that this alternative state law holding was in any way inconsistent with, or should have been overridden by, principles of federal law. The question for decision at this stage of the case, therefore, is whether the state law basis for the judgment below presents an adequate and independent state law ground that, under accepted principles, precludes the exercise of jurisdiction by this Court to review the federal question presented by the Petition for Certiorari. This question is identical to the one presented in *Henry Harper, et al. v. Virginia Department of Taxation*, No. 91-794 (Petition for Writ of Certiorari filed November 15, 1991), a companion case decided by the Supreme Court of Virginia along with Petitioners' action here.

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STATEMENT OF THE CASE

This case raises the same issues presented in *Henry Harper, et al. v. Virginia Department of Taxation*, No. 91-794 (Petition for Writ of Certiorari filed November 15, 1991) ("*Harper*"), a companion case decided by the Supreme Court of Virginia along with Petitioners' action here. The question in these cases is whether the Commonwealth of Virginia is obligated under state or federal law to repay to the Petitioners and other similarly situated claimants tax refunds in excess of $440 million. The federal component of the Petitioners' claim is based on *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989) ("*Davis*").

In a May, 1989 Complaint and a December, 1989 Amended Complaint, Petitioners, like Petitioners in *Harper*, filed suits in state court against the Virginia Department of Taxation (hereafter "Commonwealth"), seeking refunds for state income taxes paid on their federal pension benefits for the taxable years 1985, 1986, 1987 and 1988. Contrary to Petitioners' statement (Petition for Writ of Certiorari at ii and 2), it is not clear that all tax liabilities have been paid because not all Petitioners have filed tax returns for 1988.

The suits were filed under Va. Code. Ann. § 58.1-1826 (1991), which provides that "[i]f the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order [refunds]." The Petitioners' claim was that *Davis* applied retroactively to the state taxes collected in the years in question, and that the taxes were "erroneously and improperly assessed" under this provision of state law. Therefore, the case presented a situation where a state remedy was being sought to enforce a federal right.

The state trial court on cross motions for summary judgment on the issue of liability denied Petitioners relief, and the Supreme Court of Virginia affirmed.[1] In an opinion published at 241 Va. 232, 401 S.E.2d 868 (1991), the Virginia Supreme Court held two things: (1) that no federal right had been established; and (2) that in any event the state remedy was not available on the facts presented.

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[1] Because summary judgment was granted to the Commonwealth, no evidence has been taken on the proper calculation of any refund.

The Petitioners sought certiorari in this Court from the Virginia Supreme Court's original decision on the ground, among others, that the Virginia Supreme Court was in error in applying the principles of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) ("*Chevron*"), to determine whether *Davis* should be given retroactive application. At the time that petition was filed, argument had been heard and decision was pending in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991) ("*Beam*"), which presented an analogous issue. After the decision in *Beam*, this Court followed its normal practice of granting certiorari in this case, vacating the Virginia Supreme Court decision, and remanding for further consideration in light of that decision.

The Supreme Court of Virginia has now reconsidered its former decision, found the holding in *Beam* inapplicable and reaffirmed its former decision "in all respects." *Harper* Petition for Certiorari, App. A at 5a. It therefore reconsidered and reaffirmed its position that: (1) no federal right had been established; and (2) in any event the state remedy sought by the Petitioners was not available on the facts presented. The Petitioners now seek certiorari from that reconsideration.

The grounds asserted by Petitioners for invoking certiorari in this case, with the exceptions to be discussed below, are nearly identical to those offered by Petitioners in *Harper*. Respondent already has filed its opposition to the Petition for a Writ of Certiorari in *Harper* and has set forth the reasons for denying that writ. The same arguments apply equally in this case and need not be asserted again here.

ADDITIONAL REASONS FOR DENYING THE WRIT

In addition to the grounds asserted by Petitioners in *Harper*, the *Lewy* Petitioners emphasize a constitutional argument that they did not raise in the trial court below, thus precluding review by the Supreme Court of Virginia. For that reason, this issue was not considered by the Supreme Court of Virginia and is not properly before this Court.

The *Lewy* Petitioners argue that *Davis* was not a constitutional decision, but merely construed a federal statute – the Public Salary Tax Act (4 U.S.C. § 111) – and contend that pursuant to the Supremacy Clause and Article I, Section 7 of the United States Constitution, the Virginia courts were "bound by the statute." Petition for Writ of Certiorari at 6. Petitioners did not raise this issue in the trial court below, and it is clear that the Virginia Supreme Court did not address this issue in either of its opinions. Thus, the issue was not "pressed or passed upon below." *Illinois v. Gates*, 462 U.S. 213, 222 (1983). Accordingly, it is not an appropriate issue upon which this Court should premise a grant of a writ of certiorari.

Moreover, on a substantive level, Petitioners' argument is devoid of merit for two reasons. First, even assuming that 4 U.S.C. § 111 created some "right" in the Petitioners, the statute itself prescribes no remedy whatsoever for an alleged violation of that right. It is silent on the subject, and there is no evidence that Congress intended to impose upon the states a retrospective monetary liability of extraordinary magnitude. In the face of this Congressional silence, any remedy for an alleged violation of 4 U.S.C. § 111, in accordance with well-

settled principles of federalism, must be found in state law, and that is precisely how the Virginia Supreme Court decided this case.

Second, Petitioners ignore the plain language of *Davis* itself that "the dispositive question in this case is whether the tax imposed on appellant is barred by the doctrine of intergovernmental tax immunity." 489 U.S. at 814. The rationale of *Davis* was that it did not matter whether 4 U.S.C. § 111 "provide[d] an independent basis for finding immunity or merely preserve[d] the traditional constitutional prohibition against discriminatory taxes. . . . " *Id.* "In either case," this Court continued, "the scope of the immunity" claimed by the appellants "is to be determined by reference to the constitutional doctrine." Thus, the federal issue raised by Petitioners' state court action turns not on the construction of a statute, but on whether a constitutional decision of this Court applies retroactively to taxes assessed by the Commonwealth before the date of that decision.

Petitioners also erroneously state that the issue of prospectivity of new decisions does not apply to decisions construing Congressional statutes. This argument ignores this Court's own decisions expanding the construction of Title VII of the Civil Rights Act, and then providing for prospective-only application of its new interpretation when that interpretation would impose a monetary liability on the states of extraordinary magnitude. *See, e.g., Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1095, 1105-07 (1983) (Powell, Jr. concurring).

In sum, there is nothing about this case which implicates Article I, Section 7 of the Constitution or the "legislative procedures" set out in that section, and Petitioners' argument is completely unfounded.

Finally, another argument now being advanced to this Court, which had not been argued to or decided by any court in the proceedings below, is the contention that the Virginia personal income tax "piggybacks" upon the federal scheme of taxation and is, therefore, subject to a "host" of potentially unanticipated events. This description of the relationship between Virginia and federal personal income tax provisions is a deceptive mischaracterization. While Virginia does incorporate by reference terminology from the federal income tax law, *see* Va. Code § 58.1-301, and also uses federal adjusted gross income as the starting point for the calculation of Virginia personal income tax, *see* Va. Code § 58.1-322, there are numerous statutory modifications to federal adjusted gross income required before computing Virginia taxable income. *See* Va. Code § 58.1-322(B) and (C). Revisions to the Internal Revenue Code, and rules and regulations promulgated thereunder, are continually monitored by state officials, and the Virginia General Assembly routinely passes corrective legislation when it does not wish to conform with federal changes to adjusted gross income.[2]

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[2] For example, pursuant to the Internal Revenue Code of 1986, taxpayers were allowed a deduction for one-half of self-employment taxes. This deduction, effective for taxable years beginning after December 31, 1989, is applied in computing

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More importantly, the unforeseeability which the Petitioners suggest is everpresent cannot be equated to any uncertainty which may arise from Virginia's conformity with certain federal income tax provisions. An item of income may, or may not, be includable in adjusted gross income, and there is a continuing possibility that a given taxpayer may realize less income in one year than in a previous one. Thus, adjusted gross income and refund requests are always unforeseeable.[3] The important point to be made here is that Virginia has not expressly or impliedly rendered its tax scheme subject to extraordinary, unanticipated events. The typical, individual federal or state refund claim, whether based upon omitted items, mathematical errors, or otherwise, by its very nature is "unanticipated" by the taxing authority. This element of unforeseeability, inherent in the administration of any tax, has no relevance to this case in which the entire subject matter of a longstanding tax policy affecting hundreds of thousands of taxpayers has been suddenly and unexpectedly declared invalid.

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federal adjusted gross income. The Virginia General Assembly amended Va. Code § 58.1-322, effective for taxable years beginning on or after January 1, 1990, to require that the deduction be added back to federal adjusted gross income for Virginia tax purposes. *See* Va. Code § 58.1-322(B) (8).

[3] Pursuant to Va. Code § 58.1-460 *et seq.*, and 58.1-490 *et seq.*, withholding and/or estimated tax payments are required. Until returns are filed and refunds requested, taxing authorities have no idea whether an individual has overpaid income taxes.

CONCLUSION

For the foregoing reasons and for the reasons explained in our brief in opposition to the Petition for Certiorari in *Harper*, the Petition for a Writ of Certiorari to the Supreme Court of Virginia should be denied.

Respectfully submitted,

Virginia Department of Taxation

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

GAIL STARLING MARSHALL*
Deputy Attorney General

GREGORY E. LUCYK
Senior Assistant Attorney General

BARBARA H. VANN
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

Of Counsel:

PETER W. LOW, Esquire
Professor of Law
University of Virginia
School of Law
Charlottesville, Virginia 22901

* *Counsel of Record for Respondent*